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Joshua A. Douglas

University of Kentucky College of Law, joshuadouglas@uky.edu

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ENLIVENING ELECTION LAW

JOSHUA A. DOUGLAS*

Election law is alive. Of course, I do not mean that in the literal sense: there is no living, breathing thing called “Election Law,” even if corporations are now “people” for purposes of campaign finance.¹ Election law topics are alive in the sense that they are inherently interesting, relevant to current events, and dare I say it, “sexy.” With apologies to my tax colleagues, this is not a course in the technical details of IRS regulations.²

But election law cases are often lengthy and include complex discussion of constitutional doctrines. Moreover, there is rarely a clear-cut answer to a tricky election law question. The field is full of balancing tests, competing interests to weigh, and ever-shifting standards. There is even math!³

A challenge for Election Law teachers, then, is to ensure that the long judicial opinions and difficult constitutional doctrines undergirding the field of election law do not bury the vibrancy of the topic. Students are sometimes surprised when they realize that an Election Law class involves the minutiae of district line drawing, ballot access, or complex campaign finance regulations. To be sure, all of these issues are important to candidates and campaigns, but they are often less “political”—and thus less inherently exciting to students—than they might initially expect.

One way to keep an Election Law course student-friendly is to make frequent use of electronic media. Election law is well-suited to the adoption of images, videos, audio clips, and other media to bring relevance to the cases and doctrines. Today’s students are Internet-savvy and technological learners;

* Assistant Professor of Law, University of Kentucky College of Law. Thanks to Chad Flanders and the *Saint Louis University Law Journal* for the opportunity to write for the Teaching Election Law issue. Thanks also to Ned Foley and Mike Pitts for their ideas on this topic. The three of us are currently writing a new Election Law casebook to be published by Aspen, and many of the student-friendly strategies I discuss in this Essay are integral components of our approach to the written material. Indeed, several of the specific tools mentioned below come directly from their suggestions on how to teach the course, and for that I am immensely grateful.

1. See *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010).

2. Full disclosure: I never took Tax in law school, and I do not much understand the intricacies of tax law. I am sure that with some guidance I would love the topic!

3. Redistricting law, in particular, usually relies on mathematical calculations. See Michael J. Pitts, *One Person, One Vote: Teaching “Sixth Grade Arithmetic,”* 56 ST. LOUIS U. L.J. 759, 760 (2012).

using multimedia in all facets of an Election Law course can help to electrify the material, improve class discussion, and enhance overall learning.

This brief Essay explains how I use visual and other aids in my Election Law course. I provide specific examples of images, video clips, and other tools I present to my class to enliven discussion of the cases. My course has four components—redistricting, ballot access, campaign practices and campaign finance, and the law of voting—and I employ various technological tools in each one to help my students better understand the material. What follows is a survey of how I use these kinds of media in each of the units. I conclude with an idea of how to create a “Colbert Bump” for an Election Law course.

I. REDISTRICTING

The redistricting unit is perhaps the most obvious for the use of technological aids. Redistricting involves the re-drawing of legislative maps. Thus, the first place to start in bringing this topic to life is to show the students the maps under contention. Students benefit from actually seeing the maps the court was considering, especially when there are multiple maps or a change in the map from the previous redistricting.

I start the classes that cover *Reynolds v. Sims*,⁴ *Brown v. Thomson*,⁵ *Karcher v. Daggett*,⁶ *Easley v. Cromartie*,⁷ *Vieth v. Jubelirer*,⁸ and *League of United Latin American Citizens v. Perry* (“*LULAC*”)⁹ by looking at maps. Some of the maps are from the cases directly; it is difficult to truly understand the discussion in cases such as *Easley v. Cromartie* or *LULAC* without having the maps in front of you. For *LULAC*, I show both the 2000 Democrat-leaning map and the 2003 Republican-leaning mid-decade map so the students can see how the lines changed.

I display maps in other instances to introduce and expand upon the topics from the cases. For example, to present *Reynolds v. Sims* and the one person, one vote concept, I show a map of the United States with congressional districts to query whether U.S. Senate representation is fair, in which a state like Wyoming receives two Senators and a state like California (with more than sixty times the population of Wyoming) also receives two Senators. I then show population and topographical maps of both Hawaii and Colorado to ask again whether one person, one vote is vital to fair democracy, especially when a state like Colorado with uneven population distribution will have most

4. 377 U.S. 533 (1964).

5. 462 U.S. 835 (1983).

6. 462 U.S. 725 (1983).

7. 532 U.S. 234 (2001).

8. 541 U.S. 267 (2004).

9. 548 U.S. 399 (2006).

of its representatives clustered in one part of the state. The point is that instead of just discussing the constitutional requirement of one person, one vote, students actually see the consequences the rule has on representation.¹⁰

How far does one person, one vote go? *Brown v. Thomson* and *Karcher v. Daggett* define the level of permissible deviation from equal population districts for both congressional and state legislative lines as a matter of doctrine.¹¹ But what really brings the concepts home to my students is showing maps of the State House, State Senate, and Congressional Districts of Kentucky, where we are located. Students can then picture the type of deviation allowable under the cases. We also role-play; I tell them that they are representatives of one of the political parties and must offer changes to the map for the new redistricting cycle. I ask what specific changes to the lines they would suggest, using the rules from the Supreme Court's decisions and the political goal of increasing their party's representation. Which counties would they shift to a different district, and what impact would that have on court review of a new Kentucky map? This exercise is particularly relevant given that many students are from these areas and understand the local political dynamics that would accompany a new map.

Using maps to teach redistricting may be obvious, but students have remarked how much clearer the cases become when they can both review the maps involved and look at other maps to picture the consequences of the decisions.

There are additional ways of using visual aids in the redistricting unit. For example, when discussing political gerrymandering, I present a slideshow of the ten worst political gerrymanders in the country.¹² Not only is this an amusing look at the impact of the Court's decision that political gerrymandering claims are nonjusticiable without a clearer standard (at least for now), it also enables lively discussion. Last semester, after viewing one of the maps, a student raised his hand to say that he was actually from that very district. He then proceeded to tell the class the history of the district, the reason why the shape of the district was so mangled, and the local debate about the soundness of keeping the district the way it is. What a great learning moment for all of us!

10. I am happy to share any of these maps with anyone who would like to use them in their classrooms.

11. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Karcher*, 462 U.S. at 730–31.

12. See Zombie, *The Top Ten Most Gerrymandered Congressional Districts in the United States*, PJMEDIA.COM (Nov. 11, 2010, 1:30 PM), <http://pajamasmedia.com/zombie/2010/11/11/the-top-ten-most-gerrymandered-congressional-districts-in-the-united-states>; see also Chris Wilson, *Of the Algorithms, by the Algorithms, for the Algorithms*, SLATE (Jan. 13, 2009, 2:10 PM), http://www.slate.com/articles/news_and_politics/politics/2009/01/of_the_algorithms_by_the_algorithms_for_the_algorithms.html.

Another way to use media in the redistricting unit is to set up the Voting Rights Act section 2 discussion by showing *Eyes on the Prize: Bridge to Freedom*, the documentary on the civil rights era.¹³ This episode covers the history of the passage of the Voting Rights Act.¹⁴ It offers a nice counterpoint to Justice Thomas's opinion in *Holder v. Hall*, in which he criticizes the majority's approach to the minority vote dilution issue by saying it is contrary to the intent of the Congress that passed the Voting Rights Act.¹⁵ Students are better able to grasp Justice Thomas's concerns—and craft appropriate responses to them—after having learned the history of the Voting Rights Act's passage through the documentary.

In sum, the redistricting unit is rife with opportunities to use visual aids to electrify the classroom experience. Showing maps of the cases under review is an obvious strategy to enhance the discussion. Using other forms of media also can foster engaged students and deeper learning.

II. BALLOT ACCESS

I spend about two weeks on the law of nominating candidates. The cases in this section do not lend themselves to visual aids as easily as does the redistricting material, but there are still ways to assist visual learners better grasp the concepts. One simple example is to show a sample Washington state ballot when discussing *Washington State Grange v. Washington State Republican Party*, the case about the way in which Washington's ballots listed a candidate's party preference.¹⁶ As readers of the case recall, Chief Justice Roberts concurred because he thought only an as-applied challenge would be appropriate after Washington designed the actual ballots.¹⁷ Roberts thought it possible for the state to design a ballot in which a candidate could list which political party he or she preferred and no reasonable voter would believe the party wished to endorse that candidate.¹⁸ Showing students the Washington ballot adopted after that decision enables a robust discussion of the very question Chief Justice Roberts posed: Does the ballot, as actually used, convey the message that the political party endorses the candidate? Seeing the ballot allows students to grasp the consequences of the decision. I am also impressed

13. EYES ON THE PRIZE: BRIDGE TO FREEDOM (Blackside, Inc. & PBS Video 1986).

14. *Id.*

15. *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring).

16. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008). The 2010 Washington sample ballot is available at <https://wei.secstate.wa.gov/clallam/Elections/ArchivedElections/2010-2019/Documents/2010/General/2010%20General%20Sample%20Ballot.pdf>.

17. *Wash. State Grange*, 552 U.S. at 460 (Roberts, C.J., concurring).

18. *Id.* at 460–61.

by the difference of opinion students exhibit regarding the message the ballot sends both before and after viewing the actual ballot.

Another tactic I use is to show pictures of the candidates involved in the decisions. Of course, this is not a new strategy; my Constitutional Law professor used to bring in props related to the case each day to help students remember the concepts. But it is an effective strategy. For example, I put an image of Margarita Lopez Torres on the screen when introducing *New York State Board of Elections v. Lopez Torres*.¹⁹ The picture of Judge Lopez Torres has nothing to do with the case itself, but it helps to make the material relevant and memorable—in a word, “sticky.” I do the same thing for John Anderson when covering *Anderson v. Celebrezze*.²⁰

III. CAMPAIGN PRACTICES AND CAMPAIGN FINANCE

The third unit of my course is split between campaign practices and campaign finance law. Both topics lend themselves well to multimedia.

I first cover false or misleading campaign ads. The best way to bring these cases alive is to show various ads to the students and ask them to analyze how a court would rule on them. My students read *McKimm v. Ohio Elections Commission*²¹ and *Rickert v. State, Public Disclosure Commission*,²² which offer opposing views on the extent to which a state should be able to regulate false or misleading ads.²³ I then show a series of ads and ask the students to discern how the courts would interpret them. For example, I show a 2010 Tea Party advertisement against U.S. Senate write-in candidate Lisa Murkowski claiming that her Senate seat was a “gift her daddy gave her,”²⁴ which may be misleading given that she won her seat outright in 2004 after the initial appointment from the Governor, who was her father.²⁵ I display the Swift Boat Veterans for Truth ad from the 2004 Presidential election.²⁶ I also present a

19. 552 U.S. 196 (2008). For an image of Judge Lopez Torres, see Robin Finn, *Blazing a Trail, and Following Her Own Sense of What's Right*, N.Y. TIMES, Jan. 25, 2008, at B2, available at <http://www.nytimes.com/2008/01/25/nyregion/25lives.html>.

20. 460 U.S. 780 (1983). For an image of John B. Anderson, see *Interview w/ Rep. John Anderson*, LIBR. CONGRESS, <http://www.loc.gov/pictures/resource/ppmsca.19608/> (last visited Feb. 22, 2012).

21. 729 N.E.2d 364 (Ohio 2000).

22. 168 P.3d 826 (Wash. 2007) (en banc).

23. *McKimm*, 729 N.E.2d at 375 (finding false accusations against a political opponent violated state election laws); *Rickert*, 168 P.3d at 830 (finding state election laws prohibiting false ads unconstitutional as restricting political speech).

24. *Arrogant Lisa Murkowski—You Lost! (Our Country Deserves Better PAC television advertisement 2010)*, available at <http://www.youtube.com/watch?v=7OqMJ3aQC0c>.

25. See Eugene Kiely, *Murkowski vs. Tea Party, Round 2*, FACTCHECK.ORG (Oct. 6, 2010), <http://factcheck.org/2010/10/murkowski-vs-tea-party-round-2/>.

26. *Any Questions?* (Swift Boat Veterans for Truth television advertisement 2004), available at <http://www.youtube.com/watch?v=V4Zk9YmED48>.

Democratic National Committee ad attacking Karl Rove.²⁷ All three of these advertisements have some arguably misleading dialogue, which enables a discussion of the extent to which the First Amendment values of free speech clash with a state's desire to improve political discourse. I end the discussion by showing an Internet advertisement that played during the campaign to oust Iowa judges in the 2010 retention elections.²⁸ I will not spoil the ending of that ad for you here; suffice to say that it presents vividly the extent to which certain advertisements can make legislators want to regulate this area.

Moving to campaign finance, *Citizens United v. FEC* presents ample opportunities to use multimedia to enhance the classroom experience.²⁹ Here are three examples.

First, before tackling the case, I show the trailer for *Hillary: The Movie*.³⁰ This helps set up the factual discussion of what exactly the Court was reviewing.

Second, I play an audio clip of Deputy Solicitor General Malcolm Stewart answering questions during the first oral argument of the case, in which Chief Justice Roberts asked whether the government could ban a book that advocated the election or defeat of a candidate if a corporation paid for the publication of the book through its general treasury funds.³¹ Stewart stumbles over the answer before conceding that, yes, the regulation would cover this kind of book.³² Some commentators have suggested that this exchange was one major reason the Court set the case for re-argument and opened the question of whether it should overrule *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*.³³ I then ask the students to role play, putting themselves in new Solicitor General Elena Kagan's shoes and trying to figure out how to respond to the same question, which she knows the Court will ask at the re-argument. I conclude by playing the audio clip of Solicitor General Kagan's

27. *Stealing Democracy* (DNC television advertisement 2010), available at <http://www.youtube.com/watch?v=Hvm0cWgHp6A>.

28. Timhicks77, *Vote No on Judicial Retention*, YOUTUBE (Oct. 11, 2010), <http://www.youtube.com/watch?v=Mj2gOLUw5yk>.

29. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

30. *Trailer I*, HILLARY MOVIE.COM (2008), <http://www.hillarythemovie.com/trailer.html> (last visited Feb. 22, 2012).

31. *Chief Justice Roberts: Kagan Asked Court to 'Embrace Theory of First Amendment That Would Allow Censorship Not Only of Radio and Television Broadcasts, But Pamphlets and Posters'*, CNSNEWS.COM (May 10, 2010), <http://www.cnsnews.com/node/65600>.

32. *Id.*; See Transcript of Oral Argument at 29–30, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

33. See Adam Liptak, *Justices to Revisit "Hillary" Film, and Corporate Cash in Politics*, N.Y. TIMES, Aug. 30, 2009, at A1.

actual response during the September re-argument.³⁴ Students have responded extremely favorably to this type of instruction, as it places them in the posture of trying to argue for upholding the law in its most extreme application.

Finally, to demonstrate the popular conception (at least among some people) of the consequences of the Supreme Court's decision, I play for the students the advertisement for Murray Hill, Inc., the company that sought to run for Congress (because corporations are now people too!).³⁵ Of course, this is an absurd example that pushes the logic of the *Citizens United* decision too far, but it is a nice reminder of the rhetoric surrounding the debate. Plus, humor is always effective at keeping the students engaged.

IV. THE LAW OF VOTING

I conclude my Election Law course with a unit on the law of voting, which encompasses voter eligibility, election eve litigation, and election contests. Here are three suggestions to energize this material.

First, when covering voter eligibility, I lead a discussion of what rules a state should be allowed to impose on who may vote. One interesting question is why the voting age is set at eighteen.³⁶ As part of that debate, I show a clip from the television show *The West Wing*, in which a group of teenaged lobbyists visit White House Communications Director Toby Ziegler to advocate for a constitutional amendment to lower or abolish the voting age.³⁷ This scene sets off a vigorous classroom exchange about the merits of various limitations on the right to vote.

Second, before the class periods on *Bush v. Gore*, I invite my students to a "Movie Night," during which I order pizza and show the movie *Recount*.³⁸ As this comes toward the end of the semester, it provides a nice social setting in which to watch a Hollywood-type depiction of the events surrounding the 2000 presidential election. Students have told me that they understand the case better after having viewed the movie.

Finally, in covering the 2008 Coleman-Franken U.S. Senate election in Minnesota, it is fun to allow students to view the disputed ballots and "decide" which ones to count. The Minnesota Public Radio website has an interactive feature that lets users choose which ballots are valid for each candidate.³⁹ This

34. Thebackbencher666, *Kagan and Book Burning*, YOUTUBE (Jun. 30, 2010), <http://www.youtube.com/watch?v=khdK0ZPADbc>.

35. See *Murray Hill Incorporated is Running for Congress*, MURRAY HILL, <http://murrayhillincforcongress.com/> (last visited Feb. 22, 2012).

36. See U.S. CONST. amend. XXVI.

37. *The West Wing: A Good Day* (NBC television broadcast Mar. 2, 2005). This is Episode 17 of Season 6.

38. RECOUNT: THE STORY OF THE 2000 PRESIDENTIAL ELECTION (HBO Films 2008).

39. Than Tibbetts & Steve Mullis, *Challenged Ballots: You Be The Judge*, MINN. PUB. RADIO (Dec. 3, 2008), http://minnesota.publicradio.org/features/2008/11/19_challenged_ballots/.

exercise brings out the difficulties election officials face in determining voter intent.

V. THE “COLBERT BUMP” IN AN ELECTION LAW CLASS

Comedian Stephen Colbert has probably done more to make election law mainstream than anyone else in recent memory. From declaring his candidacy for President in 2008⁴⁰ to creating a Super PAC in the wake of the *Citizens United* decision,⁴¹ Colbert has exploited the intricacies of election law for his comedic advantage. In the process, he has increased the public’s awareness of election law issues. Many students are probably already familiar with Colbert’s shtick. Why not use that to your advantage to create your own “Colbert Bump” in an Election Law course?⁴² For example, in the spring and summer of 2011, Colbert aired several interviews with his election lawyer, Trevor Potter, regarding the creation of the Colbert Super PAC.⁴³

Beginning or ending a class period showing one of these clips provides a humorous way to offer some context to the material. It also can keep the issues relevant to your students. Maybe you will even experience a “Colbert Bump” in your teaching evaluations!

CONCLUSION

None of the ideas for using multimedia in the classroom are particularly novel. Today’s students are part of the social media world. They are used to gathering information from various platforms. Visual aids can help to make the classroom a more dynamic, engaging environment. The class periods in which I use a technological aid are invariably the most successful sessions of the semester. Hopefully, my suggestions for specific tools I use in each part of the course can help to spur further ideas on how to enliven an Election Law class.

40. *Stephen Colbert Barred from Ballot by South Carolina Democrats*, FOXNEWS.COM (Nov. 1, 2007), <http://www.foxnews.com/story/0,2933,307340,00.html>.

41. See David Carr, *Comic’s PAC Is More Than a Gag*, N.Y. TIMES, Aug. 22, 2011, at B1; Steve Simpson & Paul Sherman, *Stephen Colbert’s Free Speech Problem*, WALL ST. J., May 19, 2011, at A15.

42. The “Colbert Bump” is the supposed increase in popularity for a candidate or other subject who appears on *The Colbert Report*. See Christopher Borrelli, *The Colbert Bump*, CHI. TRIB., July 20, 2011, § 4, at 1 (defining the “Colbert Bump” as “a megaphone of influence, shouted by a comedian with a keen ethical compass who plays a blowhard with no ethical compass”).

43. For one such video, see *Colbert PAC – Trevor Potter*, COLBERT NATION (Mar. 30, 2011) <http://www.colbertnation.com/the-colbert-report-videos/379369/march-30-2011/colbert-pac---trevor-potter>.